



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 16, 2013

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2013-21772

Dear Mr. Ramirez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 508715.

The Lower Colorado River Authority (the "authority") received a request for information created after a specified date that is collected, assembled, or maintained by the authority relating to Garwood Irrigation Company ("Garwood") and communications with any employee, contractor, or representative of Garwood. You state you will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note portions of the requested information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2013-19936 (2013) and 2013-20457 (2013). In Open Records Letter Nos. 2013-19936 and 2013-20457, we concluded the authority may withhold the submitted information under section 552.103 of the Government Code. There is no indication the law, facts, and circumstances on which the prior rulings were based have changed. Accordingly, for the

¹We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

requested information that is identical to the information previously requested and ruled upon by this office, we conclude the authority may continue to rely on Open Records Letter Nos. 2013-19936 and 2013-20457 as previous determinations and withhold or release the identical information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). Next, we address your arguments against the disclosure of the submitted information that is not subject to these prior rulings.

Section 552.103 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4. We note contested cases conducted under the Administration Procedure Act (the "APA"),

chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

In this instance, you assert the submitted information relates to anticipated litigation. You explain the authority operates and manages releases of water from the Highland Lakes down the Colorado River. You inform us the authority filed proposed amendments to a water management plan ("WMP") with the Texas Commission on Environmental Quality (the "TCEQ"), under which the authority operates and manages the bodies of water and release of water at issue. You inform us, and provide documentation showing, members of the public have submitted requests for a contested case hearing regarding the authority's proposed WMP amendments before the TCEQ. Further, you claim, and provide documentation showing, prior to its receipt of the request for information, the authority received two demand letters from an entity with which the authority has a run-of-river water contract, taking issue with the authority's water management, and asserting a right to release of water under its contract. You also inform us the authority has applied for emergency relief with the TCEQ from the WMP environmental flow obligations for Matagorda Bay. You state the authority received a letter from a foundation opposing the authority's application for emergency relief for Matagorda Bay and that the foundation is prepared to take every legal effort to preserve inflow for Matagorda Bay. Based on your representations and our review, we determine that litigation regarding the proposed WMP amendments at issue, in the form of a contested case under the APA, and the application for emergency relief was reasonably anticipated by the authority prior to the date the authority received the present request. We further find that the information at issue relates to the anticipated litigation for purposes of section 552.103(a). Accordingly, we find the authority may withhold the submitted information under section 552.103 of the Government Code.²

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

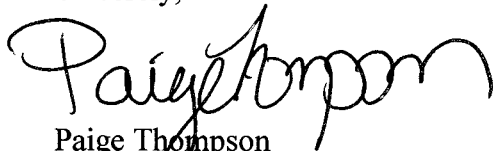
In summary, the authority may continue to rely on Open Records Letter Nos. 2013-19936 and 2013-20457 as previous determinations and withhold or release the identical information in accordance with those rulings. The authority may withhold the submitted information under section 552.103 of the Government Code.

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of the submitted information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Paige Thompson". The signature is fluid and cursive, with the first name "Paige" being more prominent than the last name "Thompson".

Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 508715

Enc. Submitted documents

c: Requestor
(w/o enclosures)